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# Supreme Court of the United States

October Term, 1964

No. 839

PEOPLE OF THE STATE OF NEW YORK,

*Respondent,*

*against*

JOSEPH GALLO,

*Petitioner.*

## PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

FRANK SERRI,
*Attorney for Petitioner;*
66 Court Street,
Brooklyn 1, New York.

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## PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

*To the Chief Justice and the Associate Justices of the Supreme Court of the United States:*

Petitioner respectfully asks this Court to issue a Writ of Certiorari to review the denial of leave to appeal by Charles S. Desmond, Chief Judge of the Court of Appeals, which denial affirmed a judgment of the Appellate Division of the Supreme Court, First Department, sustaining the conviction of the defendant.

### No Opinion Below

There was no opinion by the Appellate Division, First Department.

### Statement of Grounds of Jurisdiction

1. The judgment of the Appellate Division, First Department, was entered June 27, 1963.

2. The certificate of denial of leave to appeal to the Court of Appeals was signed by Charles S. Desmond, Chief Judge of the Court of Appeals of the State of New York on November 4, 1963.

3. The jurisdiction of this Court is invoked pursuant to the provisions of 28 U. S. C. Section 1254.

## Constitutional Amendments Involved

1. Sixth Amendment, U. S. Constitution.

2. Fourteenth Amendment, U. S. Constitution.

## Indictment

Petitioner was indicted May 26, 1961, first count, for conspiracy with four other persons, to commit extortion and second count, for attempted extortion.

## Questions Presented for Review

A. Was petitioner denied his constitutional right to assistance of counsel:

a) When defendant received no assistance because his elderly retained counsel, David Price, Esq., was recuperating in Florida on account of illness and unable to participate in the trial on November 14, 1961, and Court refused to adjourn the trial to December 4, 1961, date requested by retained counsel?

b) When defendant received no assistance from the two counsel assigned by Court on November 3, 1961, as they remained mute throughout the trial, November 14 to 16, and informed the Court on November 6th and November 14th that they had not been able to prepare adequately and they could not properly represent the defendant?

c) When defendant being a layman and not familiar with legal procedure was forced to remain mute throughout the trial?

B. Tied with "A", was petitioner deprived of his liberty without due process of law and denied the equal protection of the law:

a) When petitioner's motion for change of venue, before Appellate Division of the State of New York, First Department, returnable November 8, 1961, was blocked and cancelled, without hearing, because under pressure of trial judge, one juror was selected on November 6th for the trial on November 14th?

b) When stay of trial of Leone, another defendant, was granted by the Chief Judge of the Appellate Division, pending his motion for change of venue—because of similar, though much less prejudicial newspaper publicity—and petitioner's motion for change of venue, based on greater and overwhelming publicity, was denied by an Associate Justice?

## Statement of the Case

A fair trial is the best test of whether a society is civilized, democratic and free. And, in criminal cases, such a fair trial is impossible without the effective assistance of counsel. The fundamental character of the right to counsel has been clearly reaffirmed by this Court. Wisely overruling *Betts* v. *Brady*, 316 U. S. 455, this Court, in *Gideon* v. *Wainright*, 372 U. S. 335, returned to old precedents to emphasize the importance of assistance of counsel. It quoted from *Powell* v. *Alabama*, 287 U. S. 45, 68: "The right to the aid of counsel is of this fundamental character"; from *Grossplan* v. *Am. P. Co.*, 297 U. S. 233, 243: "And among them the fundamental right of the accused to the aid of counsel in a criminal prosecution"; and from *Johnson* v. *Zerbst*, 304 U. S. 458: "The assist-

ance of counsel is one of the safeguards of the Sixth Amendment deemed necessary to insure fundamental human rights of life and liberty".

Petitioner's basic contention is that he was tried for conspiracy to extort and for attempted extortion on November 14-16, 1961 without the assistance of counsel. His retained counsel, Mr. David Price, was ill and in Florida. The two assigned counsel informed the Court on November 6th and again on November 14th that they were not prepared for trial, asked for mistrial and adjournment to December 4th when retained counsel would be available, and remained mute throughout the trial. And the defendant, a layman, unfamiliar with procedure, likewise remained mute. A "trial" under such circumstances is not even a shadow of one—it is the shadow of a shadow. To force a trial under these conditions is not the exercise of discretion; it is the capricious, arbitrary and tyrannical abuse of discretion.

1. *Delay in proceedings prior to October 23, 1961 not chargeable to petitioner, but to policy of trying too many defendants at one time.*

The petitioner pleaded not guilty on June 6, 1961.

On June 21, 1961, the case was technically on the trial calendar. While the District Attorney formally announced that he was "ready", the Court added: "Of course, this part is not available for trial" (86). The attorney for Waffa, one of the five defendants, requested an adjournment upon the ground of Waffa's illness. In fact, Waffa slumped to floor (84). Counsel for defendant, Albergo, asked for an adjournment (81). So did the attorney for defendant, Slater (81).

With so many adjournment requests, it was self-evident that the trial had to be adjourned, and Mr. Price's engagement in a trial in Brooklyn was hardly relevant.

The date of August 7, 1961 was agreed to by the Prosecutor. However, it was with a qualified comment that he did so. "It would be perhaps August 7, 1961 that we would be ready for trial" (86). Such uncertainty is understandable. In New York, at that time, the trial of bail cases in the summertime seldom occurred.

On August 7, 1961, the number of defendants created the same problem for the Court. The attorney for Slater was sick and an adjournment was requested on that ground (104). Albergo's lawyer had withdrawn from the case and consequently Albergo was not ready for trial (108). Leone's attorney had been obliged to go out of town. He made a similar request (104).

True, Mr. Price, attorney for Gallo, was away under doctor's orders, having just completed a two month's trial (104).

The Court suggested August 30, 1961 as the time when a date could be set for trial. On that day, the date of October 23, 1961 was agreed upon for trial.

2. *October 23, 1961, changes of attorneys and two motions for change of venue by petitioner and another defendant.*

Defendant, Albergo, had just retained a new lawyer. So he could not be ready (150). Waffa's lawyer asked for permission to withdraw, and the defendant was given a week to get another lawyer (132). Leone had also retained another attorney the preceding Saturday, and he first saw the indictment that day in court.

In addition, several startling events had occurred. Since the recent attempted garrotting of petitioner's brother, and other unrelated acts of violence, unfavorable publicity which had started earlier and then subsided, had been renewed with tremendous virulence. This unprecented barrage convinced Mr. Price, as petitioner's attorney, that

a motion for a change of venue must be made in the Appellate Division (142-7).

The new attorney for defendant, Leone—whose client also had been mentioned unfavorably in the prejudicial publicity, although to a minor extent to the name of Gallo—informed the Court that he would make a similar motion for his client.

The Court asked why the motions had not been made in September and early October. That was quickly explained. There had been a lull, and it was the full blast renewal in October that created virtually a new situation. The Court recognized the need and reasonableness of such change of venue motions, and granted both attorneys one week's time to make them, and adjourned the trial to October 30, 1961 (161).

3. *October 30-31, 1961. Petitioner's change of venue motion made for first available motion day November 8, 1961 in Appellate Division.*

Of course, on October 30, 1961, the motion had not yet been argued nor decided by the Appellate Division. Having granted a week's time to make the motion, it was a fair presumption that the trial judge would postpone trial until the Appellate Division decided the motion. Instead, the trial judge insisted that an application for stay be made to a judge of the Appellate Division. Such application was made on October 30, 1961 and denied by an associate justice on October 31, 1961 (201).

In addition to the pendency in the Appellate Division of the motion for change of venue, which remained unargued and undecided, the petitioner submitted as a second ground for adjournment of the trial the illness of his retained trial counsel who was in Florida and who would return and be available for trial on December 4, 1961. An affidavit to that effect was received in the mail from Florida and submitted to the Court. (A similar affidavit

to the Clerk of the Court of Appeals resulted in adjourning argument of a pending appeal to December 7, 1961.) (339; 387)

4. *Inequality of treatment: An associate justice of the Appellate Division denied stay of trial of petitioner; the Chief Justice of the Court granted another defendant's motion for a stay.*

Petitioner, and another defendant, Leone, made a motion for stay on the same grounds. They both had pending motion for change of venue and both motions were based on prejudicial publicity. The only difference was that the publicity against petitioner was far greater. Huge headlines repeated the phrases "Gallo Mobs", "Gallo Warfare", "Gallo Gang" and inevitably linked the petitioner with unfavorable racketeering activity.

In fact, a special Grand Jury in Brooklyn devoted itself exclusively to this racketeering investigation, and subpoenaed the petitioner and thirteen others as material witnesses, and Mr. Price in October 1961 bore the brunt of representing and protecting the interests of all these persons in that unrelated proceeding, and it was the pressure of this extra work that took its inevitable toll of a veteran of the Bar in his middle seventies, and forced him, under doctor's direction, to go to Florida to prevent any disastrous consequences to himself (387).

The prosecutor argued that no specific illness was mentioned in the affidavit of retained counsel. When a man reaches his middle seventies—and is forced into semi-retirement and obliged under doctor's orders to take a rest after a two month's trial in August 1961 (104) and again forced to recuperate in Florida in November 1961, it is a safe bet that his illness is not imaginary but the inevitable accompaniment of overwork and overyears.

The physical effect on Mr. Price is only part of the situation. The Grand Jury investigation in Brooklyn produced more and more Gallo headlines in the newspapers, almost day after day. If anybody was entitled to a stay because of unfavorable publicity, it was the petitioner. Instead, the stay was granted to defendant, Leone by the Chief Justice, and denied to petitioner by an associate justice (186-88). That the Prosecutor opposed petitioner's motion more vigorously than that of Leone is not an answer. It is the inequality of treatment—based on petitioner's overwhelming case as compared to that of Leone—that is discriminatory and a denial of due process.

*5. By forcing selection of one juror on November 6, 1961 the petitioner's change of venue motion returnable November 8, 1961 in Appellate Division, was automatically cancelled. It could no longer be considered.*

The trial judge had granted a week's time to bring on a motion for change of venue. Of what utility was such a motion when made for first available motion date in Appellate Division, if the trial judge had not intended to wait until the Appellate Division decided?

But on November 6th—knowing that the motion for change of venue had not been argued and not decided—the trial judge in effect nullified the motion without himself passing on its merits or letting the Appellate Division pass on its merits. He did this by forcing the selection of one juror on November 6th. Such a selection under New York law blocks any further consideration of any change of venue motion.

Such disposition, with its prejudicial effects, we submit, is not the impartial and fair administration of justice. It is the denial of due process.

6. *The two assigned counsel could not prepare properly for trial, remained mute throughout trial, November 14-16, and offered no defense.*

As to one of the assigned counsel, Robert I. Weiswasser, he had informed the Court that because he had never tried a jury case and had been admitted to the Bar only 10 months, he could not properly and adequately represent the petitioner's rights, nor fulfill his obligations to retained counsel, Mr. Price, who was his employer.

The Court recognized Robert Weiswasser's predicament and stated that it was not appointing him to try the case, but that the Court would appoint an experienced lawyer to do that, and Mr. Irving Mendelson, admittedly a lawyer of many years practice in the criminal law was appointed (263).

On November 6th and on November 14th, both assigned lawyers reported to the Court that they could not properly represent the petitioner. This was due in part to the shortness of time which made it impossible for them to prepare for trial; also because the petitioner had retained counsel who would be available for trial on December 4, 1961; because petitioner expressed his confidence in retained counsel, and preferred to be represented only by him; and also because the action of assigned counsel, Irving Mendelson, in participating in the selection of one juror on November 6th—who was subsequently excused on the 14th—had resulted in foreclosing the petitioner's right to a hearing on change of venue motion and had seriously strained the relations between petitioner and Irving Mendelson, assigned counsel. For all these reasons both assigned attorneys told the Court that they could not properly defend petitioner and that they must stand mute throughout the trial (430-1, 451, 456).

*7. Petitioner, likewise, remained mute throughout the trial on November 14-16, 1961 and so had no representation.*

In short, nobody represented the petitioner at his trial. The retained counsel was ill and in Florida and would not be available until December 4, 1961. The two assigned counsel, for the adequate reasons already stated, remained mute and offered no defense. Petitioner as a layman remained mute and did not represent himself as he had neither experience nor ability to do so.

Could there be a plainer total denial of assistance of counsel? This brings the instant case squarely within, not the facts, but within the question raised in *Avery* v. *Alabama*, 308 U. S. 444, 445:

> "Had petitioner been denied any representation of counsel at all, such a clear violation of the 14th Amendment * * * would have required reversal of his conviction."

On the actual facts in *Avery*, the Court affirmed because both assigned attorneys, although with only three days' preparation, did actually represent the defendant. And the Court emphasized, page 452, that there was absent on the motion and hearing for new trial, any indication "that they could have done more had additional time been granted."

*8. Cases involving merely adequacy of time to prepare, usually present a debatable or discretionary issue and are not controlling.*

For instance, in *Spaulding* v. *U. S.*, 279 F. (2) 65, a week's time for trial preparation was held not so short as to be unconstitutional. In *United States* v. *Decker*, 304 F. (2) 702, 12 days to prepare was held within the discretion of the district judge; in *Torres* v. *United States*, 270 F. (2) 252, seven days' adjournment was held within sound discretion of trial judge.

However, without agreeing that those decisions are correct, even in such cases, the time may be so limited as to be considered a total denial. In *Jones* v. *Cunningham*, 297 F. (2) 851, the counsel was appointed on the very day of the trial. He represented the defendant, but the Appellate Court reversed, page 855: "The act of appointing counsel is not enough if in the circumstances the defendant is not afforded in any substantial sense proper advice and assistance."

*Pro forma* or token appearance of counsel is not enough. As stated in *Brubaker* v. *Dickson*, 310 F. (2) 30, page 37: "But the constitutional requirement of representation at trial is one of substance, not of form. It could not be satisfied by a pro forma or token appearance. Appellant was entitled to effective aid in the preparation and trial of the case."

And the decisions of the Court of Appeals in New York are to the same effect. The granting of four days, instead of an adjournment of two weeks as requested, was ground for reversal. *People* v. *Snyder*, 297 N. Y. 81. At page 90, the Court wrote

> "His right to protection by Court and prosecution authorities so that he might have the assistance of adequately prepared counsel for his defense was a fundamental one. We think that the denial of a request for an adjournment under these circumstances here presented was an abuse of discretion as a matter of law."

Moreover, in the instant case, the very counsel assigned on November 3 by the Court reported on the 14th of November to the Court that they had been unable to prepare adequately and could not properly defend petitioner. That neutral opinion, particularly of the chief counsel, Irving Mendelson, who had been assigned to try the case, should have prevailed, and his motion to go over to December 4, 1961 should have been granted.

That right to a fair trial should have counterbalanced the Prosecutor's claim concerning expense of the protective custody for the complainant, and that he might run away. The adjournment requested was only to December 4th, less than three weeks, and, besides, the testimony of the complainant had been perpetuated in the Felony Court in May, 1961.

## Reasons for Granting Writ

1. We repeat: "A fair trial is the best test of whether a society is civilized, democratic and free." Such a fair trial is impossible without the assistance of counsel.

2. No defendant should be sentenced to not less than seven years and three months and not more than fourteen years and six months without a fair trial.

3. Appointment of two counsel on November 3rd who stand mute throughout trial on November 14, 1961 because they could not adequately prepare to defend petitioner, violates petitioner's constitutional right to assistance of counsel.

4. Depriving petitioner of a hearing on his change of venue motion, by forcing the selection of one juror on November 6th and discharging him on November 14th, deprives petitioner of his liberty without due process of law.

5. Denial by an associate judge of the Appellate Division of petitioner's application for stay of trial, and the granting by the Chief Justice of such a stay to another defendant, Leone, on the basis of prejudicial publicity aimed primarily at the Gallos, is a denial of the equal protection of the law.

6. Where there is a combination of unique, triple injustices—no aid of counsel, no stay of trial, no hearing of motion for change of venue—there is the extraordinary case which merits review and remedy by the United States Supreme Court.

## CONCLUSION

**It is respectfully submitted that a Writ of Certiorari should be granted to review the order of the Court of Appeals of the State of New York.**

Respectfully submitted,

FRANK SERRI,
*Attorney for Petitioner,*
66 Court Street,
Brooklyn 1, New York.

# APPENDIX A

## Certificate Denying Leave

COURT OF APPEALS

STATE OF NEW YORK

Before:

HON. CHARLES S. DESMOND, *Chief Judge.*

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THE PEOPLE OF THE STATE OF NEW YORK,

*against*

JOSEPH GALLO,

Defendant-Appellant.

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I, CHARLES S. DESMOND, Chief Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above named appellant for a certificate pursuant to Sec. 520 of the Code of Criminal Procedure, and upon the record and proceedings herein, there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied. (Judgment of the Appellate Division, First Department, entered June 27, 1963, which affirmed a judgment of the Court of General Sessions, New York County, convicting defendant of conspiracy to commit extortion and attempted extortion.)

Dated at Buffalo, New York,
November 4, 1963.

CHARLES S. DESMOND,
*Chief Judge.*